Supreme Court, U.S.
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No. ———

In The
Supreme Court of the United States

JOSE A. RIVAS,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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September 1, 2009

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QUESTIONS PRESENTED

Whether, under the Confrontation and Due Process Clauses, a defendant has a Constitutional right to examine the prosecution's physical trial evidence against him so that he may challenge its authenticity and reliability?

And, if so, whether a state procedural rule that conditions a defendant's ability to examine the prosecution's trial evidence upon the defendant's showing that the prosecution "has provided false, incomplete, adulterated, or spoliated evidence" improperly shifts the prosecution's evidentiary burden onto a defendant in violation of the Due Process Clause?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jose Rivas respectfully petitions for a writ of certiorari *to the Supreme Court of Ohio* in *State v. Rivas,* 121 Ohio St.3d 469, 905 N.E.2d 618 (Ohio 2009).

OPINION BELOW

The opinion of the Supreme Court of Ohio issued March 31, 2009 (Apx.1a) is published at 121 Ohio St.3d 469, 905 N.E.2d 618. The order of the Supreme Court of Ohio (entered June 3, 2009) denying reconsideration (Apx.17a) is unpublished and unreported. The opinion of the Ohio Court of Appeals for the Second District, issued July 13, 2009, is published at 172 Ohio App.3d 473, 875 N.E.2d 665. (Apx.18a). The relevant decisions of the Greene County Common Pleas Court (Apx.30a-37a) are unpublished and unreported.

STATEMENT OF JURISDICTION

The Supreme Court of Ohio initially decided this case on March 31, 2009, and denied Petitioner's timely motion for reconsideration on June 3, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part that: "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him;

to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment, Section 1, to the United States Constitution provides in relevant part that: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Ohio Rule of Criminal Procedure 16(B)(1)(c), provides in relevant part that: "[u]pon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant." Ohio Crim.R. 16 is reproduced in its entirety at Apx.38a, with (B)(1)(c) located at Apx.39a.

INTRODUCTION

This case presents the issue of whether a criminal defendant can be denied the opportunity to inspect a computer hard drive in the possession of the prosecution in order to determine the authenticity and reliability of a computer generated printout of a purported online communication between a defendant and an undercover police officer posing as a minor. The printout was the centerpiece of the prosecution's case.

This issue is especially timely in light of the fact that law enforcement agencies are increasingly reliant upon technology, including electronic data, to investigate and prosecute criminal defendants. Despite the growing primacy of physical evidence in criminal trials, this Court has never squarely addressed whether a criminal defendant has a Constitutional right to examine the prosecution's physical trial evidence against him so he may verify – or refute – its authenticity, accuracy and reliability. Until now, the issue has been dormant because procedural rules in nearly every state and federal court provide that a defendant is entitled to pretrial discovery of physical evidence that the prosecution intends to use at trial. That is no longer the case in Ohio.

As a result of the opinion below, Ohio Crim.R.16 now prohibits a defendant in that state from examining the original source of the prosecution's physical trial evidence unless the defendant can make a prima facie showing – without the benefit of pretrial discovery – that the prosecution "has provided false, incomplete, adulterated, or spoliated evidence." In the estimation of the Supreme Court of Ohio, "ordering the state to verify its discovery...sends the wrong message to the legal community." (Apx.11a).

Ohio's procedural rule is irreconcilable with this Court's mandate that states provide a defendant with "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); citing *California v. Trombetta*, 467 U.S. 479, 485 (1984). It is further incompatible with this Court's holdings in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Melendez-Diaz v. Massachusetts*, --U.S.--,

129 S.Ct. 2527 (2009), requiring that a defendant be permitted to challenge the prosecution's evidence against him through cross-examination. These established rights to Due Process and Confrontation are illusory if a defendant is denied the opportunity to challenge the authenticity, reliability and accuracy of physical evidence that the state intends to use against him at trial.

STATEMENT

1. Petitioner was charged with soliciting sex from a minor following his online conversation with a police detective who allegedly was posing as a minor.

The central evidence of the alleged offense was an online communication between Petitioner and the detective. The prosecution offered the detective's testimony, which it supported by a transcript of the online communication that the detective testified he had printed from a police computer. On the printout, the detective identified himself as 14 years old. Petitioner disputed the accuracy of the printout, asserting that the detective had, in fact, identified himself as 41 years old during their online communication. Notably, the detective was 41 years old at the time and he had arranged to meet the Petitioner at a hotel bar.

2. Pursuant to Ohio Rule of Criminal Procedure 16(B)(1)(c), Petitioner sought to examine the electronic data from which the detective allegedly generated the transcript. (Apx.D). The trial court initially granted Petitioner's request and ordered the prosecution to make the electronic data available for inspection by

Petitioner's retained computer expert under police supervision. (Apx.E).

The police refused, citing non-specific "security concerns." Police provided Petitioner's expert only with a paper printout of the conversation and a compact disc containing a scanned copy of the same. Neither format contained the original electronic data from which the printout was derived.

3. Petitioner moved to compel examination of the electronic evidence.

At a hearing, Petitioner's retained computer expert testified that examining the hard drive from which the printout was generated was the only way to determine whether the printout was an authentic and accurate representation of the online communications between Petitioner and the detective. He further testified as to how a printout could potentially be altered without such alterations being apparent from the face of a printout.

Notwithstanding, the trial court reversed its previous discovery order and prohibited Petitioner from examining the electronic data unless he could provide "some evidence that what has been provided [printouts] is not accurate." (Apx.33a).

4. At trial, the prosecution offered the printout into evidence over defense objection. In addition, the police detective testified at length regarding the content of the printout. The jury convicted Petitioner on both felony counts.

5. On direct appeal, the Ohio Court of Appeals for the Second District unanimously reversed the trial court, holding that "[f]orcing a litigant to rely upon an adverse party's representation that a transcript from a hard drive accurately reflects the information stored on the hard drive, when that accuracy could be directly verified, is inconsistent with due process." (Apx.19a). Instead, the appellate court held that "[w]here there is direct evidence of a conversation allegedly constituting the crime with which the defendant is charged, we hold that the right to a fair trial includes the right of the defendant to some reasonable means of verifying that a purported transcript of a conversation, prepared from the direct evidence by the adverse party, is accurate and complete." * * * (Apx.25a).

6. The Supreme Court of Ohio, in a 4-3 decision, reversed the appellate court, finding that "ordering the state to verify its discovery...sends the wrong message to the legal community and does not represent the law of this state." (Apx.11a).

According to the Supreme Court of Ohio, under Ohio Crim.R. 16, "when a prosecutor has provided a written transcript that purports to accurately reflect data stored on a computer hard drive, a court may not order an examination of the computer hard drive unless the defense makes a prima facie showing that the state has provided false, incomplete, adulterated, or spoliated evidence." (Id.).

REASONS FOR GRANTING THE WRIT

Petitioner respectfully requests the Court grant certiorari for three reasons:

First, this Court has never squarely addressed the fundamental question of whether a defendant has a Constitutional right to examine the prosecution's trial evidence against him. This makes clear that the need for this Court's guidance is now.

Second, Ohio's procedural rule requiring a defendant to show a defect in the prosecution's trial evidence as a precondition to examining it is plainly inconsistent with this Court's decisions regarding Due Process and Confrontation. Indeed, these Constitutional rights are illusory if a defendant is denied the ability to confirm or refute whether physical evidence against him is what the prosecution purports it to be.

Third, this decision threatens an immediate, profound and unconstitutional impact on all criminal cases involving physical evidence in Ohio. If left to stand, the rule in Ohio will be that the prosecution's physical trial evidence is presumed authentic and reliable unless a defendant can meet the nearly impossible burden of showing – without the benefit of independent examination – that it is not.

I. The Court has never squarely addressed whether a defendant has a Constitutional right to examine the prosecution's physical trial evidence against him.

Until now it has not been necessary for this Court to explicitly address whether a defendant has a Constitutional right to examine the prosecution's physical trial evidence against him. The procedural rules in nearly every state as well as the federal courts entitle a defendant to pretrial discovery of physical evidence that the prosecution intends to use at trial. See e.g. Fed.R.Crim.P. 16. This is no longer the case in Ohio.

While this Court has traditionally deferred to the states to prescribe procedural and evidentiary rules for criminal proceedings, the Court has made clear that "[t]his latitude, however, has limits." *Holmes,* 547 U.S. at 324. "Whether rooted in the Due Process Clause or the Confrontation Clause, the Constitution guarantees a criminal defendant 'a meaningful opportunity to present a complete defense.'" *Id.*; *Crane v. Kentucky,* 476 U.S. 683, 690 (1986); quoting *California v. Trombetta,* 467 U.S. 479, 485 (1984). Where, as here, state rules "infring[e] upon the weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purpose they are designed to serve,'" this Court has not hesitated to intervene. *Holmes,* 547 U.S. at 324; quoting *U.S. v. Scheffer,* 523 U.S. 303, 308 (1998) and *Rock v. Arkansas,* 483 U.S. 44, 58 (1987).

The Supreme Court of Ohio's pronouncement that Crim.R.16(B)(1)(c) requires a defendant to prove, as a condition to examining the prosecution's trial evidence against him, that the prosecution "has provided false,

incomplete, adulterated, or spoliated evidence" is precisely the sort of arbitrary and disproportionate rule that "infringes upon the weighty interest of the accused" – and warrants this Court's intervention. As the three dissenting state court justices explained:

> There is no justification for creating, as the majority opinion does, a permanent judicial gloss over the plain language of the discovery rules to short-circuit [Petitioner's] discovery request. Moreover, imposing such a standard ignores the plain language of [Crim.R.16(B)(1)(c)] by imposing obligations on the defendant beyond the rule's 'materiality' standard. * * * [F]orcing a litigant to rely upon an adverse party's representation that a transcript is accurate without allowing any verification of that accuracy is inconsistent with general notions of a fair trial." (Apx.13a-14a, citing *State v. Rivas,* 172 Ohio App.3d 473, 875 N.E.2d 655 (2007), Apx.19a).

While this case involves the denial of pretrial discovery, it is not resolved by either this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963) governing the suppression of material, exculpatory evidence or *Arizona v. Youngblood,* 488 U.S. 51 (1988) governing the loss or destruction of exculpatory evidence. Both of those decisions addressed evidence that a jury never saw – evidence that did not factor into the jury's verdict. This case, however, involves an entirely distinct issue involving evidence that the prosecution actually uses against a defendant at trial. This Court has never directly addressed whether, under the Due Process and Confrontation Clauses, a criminal defendant has the right to challenge the

authenticity, reliability and accuracy of the prosecution's physical evidence used against him at trial.

II. Ohio's procedural rule requiring a defendant to make a prima facie showing that physical evidence has been falsified or spoliated as a precondition to examining that evidence is plainly inconsistent with Due Process and Confrontation.

While the Court has not directly addressed this issue, the opinion below – and the new state procedural rule it encompasses – is clearly incompatible with this Court's precedent in two regards:

First, to the extent Ohio now procedurally burdens a defendant with proving that the prosecution "has provided false, incomplete, adulterated, or spoliated evidence" (Apx.11a) as a precondition to pretrial discovery, it is inconsistent with two of this Court's seminal Due Process decisions. The first is *In Re Winship,* confirming that the prosecution must always bear the burden of proving every element of its case beyond a reasonable doubt. *Winship,* 397 U.S. 358, 364 (1970). The second is *Trombetta,* requiring a state to provide a defendant with "a meaningful opportunity to present a complete defense." 467 U.S. at 485. Ohio's new rule of criminal procedure flouts both of these precedents. Remarkably, in Ohio, in order for a defendant to verify whether the prosecution's trial evidence against him is authentic and reliable, he must first present evidence that it is not. *Id.*

The Supreme Court of Ohio's reliance on this Court's decision in *U.S. v. Agurs*, 427 U.S. 97 (1976) is grossly misplaced and warrants this Court's correction. (Apx.9a). In *Agurs*, a defendant convicted of murder argued that the prosecution's failure to disclose the victim's criminal record violated Due Process. 427 U.S. at 99-100. This Court rejected that argument largely because the defendant never requested the record during pretrial discovery. Moreover, she offered no explanation as to how it could have affected the outcome, holding that "[t]he mere possibility that an item of undisclosed information might have aided the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id.* at 109-110 (emphasis added).

In focusing on this singular statement in *Agurs*, the majority apparently ignored the rest of this Court's decision. The Court expressly stated that the "materiality" of items requested during discovery is different than those that are not. *Id.* at 106 ("test of materiality in a case like *Brady* in which specific information has been requested by the defense is not necessarily the same as in a case in which no such request has been made"). Indeed, the *Agurs* Court expressly warned that "[w]hen the prosecutor receives a specific and relevant [discovery] request," his failure to respond to such "is seldom, if ever, excusable." *Id.*

The Supreme Court of Ohio's comparison of Petitioner's discovery request to a "fishing expedition" reflects that court's disdain for a defendant's right to conduct meaningful pretrial discovery. Petitioner's request was not only specific and relevant, it precisely stated that he needed the electronic evidence because he disputed the accuracy of the information contained

on the computer generated printout that the prosecution intended to use against him at trial. The Supreme Court of Ohio held that this was insufficient to establish "materiality" for the purposes of pretrial discovery. (Apx.9a). Instead, the court held that a defendant must make a prima facie showing not simply that the evidence is necessary to his defense, but also that it is "false, incomplete, adulterated, or spoliated evidence." (Apx.11a).

The sophistry in this reasoning is apparent. In order to discover whether a defect exists in the prosecution's trial evidence, a defendant must first be able to prove the existence of the defect. This holding – and the new procedural rule it establishes – plainly deprive a defendant of any reasonable means of ensuring that the prosecution has proven its case beyond a reasonable doubt or of presenting a complete defense.

Second, the Supreme Court of Ohio's holding renders a defendant's right to Confrontation – recently confirmed by this Court in *Crawford* and *Melendez-Diaz* – virtually meaningless. The Court has described the Confrontation Clause as a procedural guarantee that the reliability of the state's evidence "be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Indeed, as the appellate court in this decision below aptly recognized:

> [i]ncreasingly, the testimony of witnesses may actually be less important to the outcome of a criminal trial than [physical] evidence. Examples of this trend include DNA evidence in a criminal case and blood-alcohol tests in

prosecutions for driving with a prohibited concentration of alcohol in the blood. (Apx.24a).

Those examples represent a category of physical evidence that is not merely probative of an element of the prosecution's case, but, if authentic and reliable, is dispositive of it. A defendant's right to cross-examine witness testimony regarding this often outcome-influencing evidence has little value if the defendant is prevented from scrutinizing the evidence in the absence of a smoking gun that shows the evidence is defective. A defendant's best and often only opportunity to determine whether the prosecution's trial evidence against him is what the prosecution purports it to be is through pretrial discovery.

III. Without this Court's immediate intervention, Ohio's procedural rule will preclude a defendant from being able to discover potential defects in the prosecution's physical trial evidence against him.

This case clearly demonstrates how Ohio's new procedural discovery rule is a crippling catch-22 for a defendant:

The police detective testified that during his online communications with Petitioner he told Petitioner that he was 14 years of age. Petitioner, however, testified that the police officer told him he was 41 – an assertion that Petitioner volunteered to police officers immediately upon being detained but before he was even arrested. The electronic data of the online communications between the detective and the Petitioner represented a direct and certain way to

determine which witness was telling the truth. And yet Petitioner was denied the opportunity to examine the computer's hard drive to directly challenge the accuracy of the printout as well as the testimony of the detective.

To the extent the printout used to convict Petitioner may have been defective – either as result of intentional or unintentional actions by the police or prosecution – such defects could not be ascertained, much less established, by the defense with any level of credibility, without examining the hard drive from which the printout was purportedly derived. Thus, while Petitioner may have had the right to cross-examine the police detective, he was denied any meaningful way of doing so with regard to the printout.

Computers do not lie. But people – even police officers and prosecutors – can. There was one sure way to know who was telling the truth in this case: the electronic data. Yet the Supreme Court of Ohio now accords a judicially sanctioned deference to the credibility of physical evidence and testimony offered by the prosecution and law enforcement. Such deference is wholly inconsistent with principles underlying a defendant's right to Due Process and Confrontation.

CONCLUSION

For these reasons, Petitioner respectfully requests the Court grant his petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

[Cite as *State v. Rivas*, 121 Ohio St.3d 469, 2009-Ohio-1354.]

THE SUPREME COURT OF OHIO

No. 2007-1611

Submitted September 16, 2008
Decided March 31, 2009

THE STATE OF OHIO,
APPELLANT,

v.

RIVAS,
APPELLEE.

Criminal law — Discovery — Crim.R. 16(B)(1)(c) — Evidence on police computers — When a prosecutor has provided a written transcript that purports to accurately reflect data stored on a computer hard drive, a court may not order an examination of the computer hard drive unless the defense makes a prima facie showing that the state has provided false, incomplete, adulterated, or spoliated evidence — Judgment reversed.

APPEAL from the Court of Appeals for Greene County, No. 05-CA-147, 172 Ohio App.3d 473, 2007-Ohio-3593.

SYLLABUS OF THE COURT

Pursuant to a Crim.R. 16(B)(1)(c) discovery request, when a prosecutor has provided a written transcript that purports to accurately reflect data stored on a computer hard drive, a court may not order an examination of the computer hard drive unless the defense makes a prima facie showing that the state has provided false, incomplete, adulterated, or spoliated evidence.

O'DONNELL, J.

{¶ 1} The Second District Court of Appeals reversed the judgment convicting Jose Rivas of importuning and attempted unlawful sexual conduct with a minor based on a trial court ruling denying him the opportunity to verify the accuracy of discovery provided by the state by allowing his expert to examine the state's computer hard drive. The state of Ohio has appealed that judgment to this court, and we agreed to address its proposition of law concerning the propriety of a trial court denying a motion to compel discovery of a confidential law enforcement investigatory record absent a showing of particularized need. We conclude that when, pursuant to a Crim.R. 16(B)(1)(c) discovery request, a prosecutor has provided a written transcript that purports to accurately reflect data stored on a computer hard drive, a court may not order an examination of the

computer hard drive unless the defense makes a prima facie showing that the state has provided false, incomplete, adulterated, or spoliated evidence. Because Rivas failed to meet that burden, the judgment of the court of appeals is reversed.

Facts and Procedural History

{¶ 2} On January 3, 2005, Detective Alonzo Wilson, a member of the Xenia Police Division's Internet Child-Protection Unit, logged onto an Internet chat service posing as a 14-year-old female named Molly. Jose Rivas, using the screen name JRivas123, contacted Molly, asking for her age, gender, and photograph. The two carried on an online conversation, and eventually Wilson e-mailed Rivas a teenage photo of a Xenia police detective. Rivas e-mailed Molly a picture of a male with an exposed, erect penis protruding through underwear and led her to believe it depicted him. He then propositioned her and offered her $200 to engage in sexual activity with him. Wilson contacted Rivas the next day, and Rivas again offered her $200 and arranged to meet her at the Holiday Inn in Xenia. Molly advised that she had a pager, and Rivas agreed to send her a page with his Holiday Inn room number.

{¶ 3} After printing a transcript of the online conversations, Wilson arranged to have a surveillance team watch the hotel. He waited in an office behind the front desk at the Holiday Inn as Rivas checked into a room, and he observed that the name Jose Rivas matched the suspect's screen name, JRivas123, in the online communications. The hotel assigned room 302 to Rivas, and soon thereafter, Wilson received an electronic page that contained the number 302. Wilson

arrested Rivas at the Holiday Inn, and subsequently, a grand jury indicted him for importuning and attempted unlawful sexual conduct with a minor.

{¶ 4} Prior to trial, Rivas moved to preserve the state's electronic evidence and sought a mirror image of the hard drive of the state's computer used by Wilson to communicate with him. The trial court ordered the state to allow Rivas to inspect the computer, but the prosecution refused to allow the defense to retrieve a mirror image of the hard drive, citing "security reasons." The prosecution provided a transcript of the conversations and a compact disc containing an electronic copy of the online communications.

{¶ 5} Rivas moved to suppress the computer-generated evidence and to compel the state to provide a mirror image of the computer hard drive. The trial court denied the motion to suppress and the motion to compel, concluding that Crim.R. 16(B)(1)(c) did not require the state to produce an exact copy of its computer hard drive "in the absence of allegations and some evidence that what has been provided is not accurate." In particular, the trial court found no evidence that the transcript of the Internet communications between Rivas and Wilson had been "altered or compromised in any way." It explained that any concerns identified by Rivas relating to altered or deleted data on the hard drive were relieved by the fact that rebooting and using the same computer for different cases would not have affected the accuracy or integrity of the transcript because Detective Wilson had printed the hard copy of the chats immediately following those sessions. The trial court further noted that Rivas had destroyed his own hard drive, which

would have allowed him to verify the accuracy of the discovery provided by the state.

{¶ 6} At trial, Rivas alleged that the transcript did not accurately reflect his Internet communications with Wilson. He asserted that he had communicated with a 41-year-old woman, not a 14-year-old girl, and denied receiving a photograph of a 14-year-old girl during the online exchanges. His contention is belied by the fact that there were several references in the transcript to doing homework, her supervision by her grandmother, the fact that she had to be home by a certain hour, and his assent that she would be able to comply with that time deadline. Rivas challenged the accuracy of some of the statements appearing in the transcript. The jury found Rivas guilty of importuning and attempted unlawful sexual conduct with a minor.

{¶ 7} The court of appeals reversed both convictions, holding that the trial court had violated Rivas's right to a fair trial when it refused Rivas the opportunity to verify the accuracy and completeness of the computer transcripts prepared by the state, stating that "a defendant should not be required to take the word of the adverse party * * * that a transcript of information stored on a hard drive is accurate * * *." *State v. Rivas*, 172 Ohio App.3d 473, 2007-Ohio-3593, 875 N.E.2d 655, at ¶ 15. The appellate court concluded that the trial court could have upheld the state's need to safeguard the confidentiality of information stored on the computer while protecting Rivas's right to a fair trial by conducting its own in camera inspection of the hard drive. Id. at ¶ 17. The cause is before the court upon our acceptance of the state's appeal. *State v. Rivas*, 116 Ohio St.3d 1455, 2007-Ohio-6803, 878 N.E.2d 33.

Proposition of Law

{¶ 8} On appeal to this court, the state contends that the trial court properly denied Rivas's motion to compel discovery because the hard drive contained confidential law enforcement investigatory records protected from disclosure under the Public Records Act in R.C. 149.43(A)(1)(h). According to the state, Rivas also failed to meet his burden to show that the discovery provided by the state was incomplete or otherwise inaccurate, and therefore Crim.R. 16(B) did not require an inspection of the computer's hard drive.

{¶ 9} Rivas maintains that R.C. 149.43(A)(1)(h) relates to public records requests and does not protect police records from discovery in the course of litigation. He urges that the plain language of Crim.R. 16(B)(1)(c) permits him to inspect and copy the hard drive, explaining that the rule requires discovery of tangible evidence that is material to the preparation of his defense. Further, Rivas asserts that the hard drive is material evidence because his expert's testimony established specific concerns regarding the accuracy of the transcripts that represented the communications between Wilson and Rivas.

{¶ 10} We are called upon to consider whether, in a case in which the prosecutor has complied with its duty to provide discovery by delivering a transcript of evidence from the hard drive of a police computer, the accused has a right to obtain a mirror image of the computer hard drive without making a prima facie showing that the information in the transcript is false, incomplete, adulterated, or spoliated.

Law and Analysis

{¶ 11} Crim.R. 16(B)(1)(c) governs the disclosure of documents and tangible evidence by a prosecuting attorney: "Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant." Thus, as relevant to this case, Crim.R. 16(B)(1)(c) permits the accused to inspect tangible evidence that is material to the preparation of his defense.

{¶ 12} The question of which party bears the burden of going forward with evidence when the accused seeks to verify the discovery provided by the state pursuant to Crim.R. 16(B)(1)(c) appears to be one of first impression in this court. However, in *Chillicothe v. Knight* (1992), 75 Ohio App.3d 544, 550, 599 N.E.2d 871, the court held that it is the accused who bears the initial burden of establishing a prima facie case of materiality before Crim.R. 16(B) requires the state to turn over tangible evidence.

{¶ 13} Further, Rule 16(a)(1)(E) of the current Federal Rules of Criminal Procedure, which is analogous to Crim.R. 16(B)(1)(c), requires that "the defendant show[ ] that disclosure of the document or tangible object is material to the defense" before it requires the government to produce tangible evidence in its possession. Fed.R.Crim.P. 16 Advisory

Committee Note on the 1974 Amendment. Federal courts interpreting Fed.R.Crim.P. 16(a)(1)(E) and its predecessor provision, Fed.R.Crim.P. 16(a)(1)(C), Advisory Committee Notes on the 2002 Amendments, have held that the accused bears the burden of making a prima facie showing of entitlement to the materials sought in discovery before the rule requires the government to produce them. " 'To obtain discovery under Rule 16, a defendant must make a prima facie showing of materiality.' " *United States v. Zone* (C.A.9, 2005), 403 F.3d 1101, 1107, quoting *United States v. Mandel* (C.A.9, 1990), 914 F.2d 1215, 1219; *United States v. Thompson* (C.A.7, 1991), 944 F.2d 1331, 1341 ("To successfully press a claim that the government violated [Fed.R.Crim.P. 16(a)(1)(C)], the defendant must make at least a *prima facie* showing that the requested items are material to his defense"); *United States v. Carrasquillo-Plaza* (C.A.1, 1989), 873 F.2d 10, 12 ("defendant did not make a request, together with 'a prima facie showing of materiality,' for the statements as required under [Fed.R.Crim.P 16(a)(1)(C)]"); *United States v. Buckley* (C.A.5, 1978), 586 F.2d 498, 506 ("Contrary to Buckley's assertion that Rule 16(a)(1)(C) 'mandate(s) the production of such documents upon request,' it is incumbent upon a defendant to make a Prima facie showing of 'materiality' in order to obtain discovery").

{¶ 14} Moreover, in other situations in which the accused asserts that the government withheld or destroyed evidence, this court has held that the accused bears the burden of establishing his case. The defendant bears the burden of showing that the state acted in bad faith in destroying potentially useful evidence, *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1, at ¶ 14, and of showing

that the state withheld favorable and material evidence. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, at ¶ 338-339. Mere speculation does not meet the accused's burden to show that the withheld evidence is material. Id. at ¶ 339; *State v. Jackson* (1991), 57 Ohio St.3d 29, 33, 565 N.E.2d 549, quoting *United States v. Agurs* (1976), 427 U.S. 97, 109-110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (" 'The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense' ").

{¶ 15} Similarly, to show spoliation of evidence, the "proponent must first establish that (1) the evidence is relevant, (2) the offending party's expert had an opportunity to examine the unaltered evidence, and (3) even though the offending party was put on notice of impending litigation, this evidence was intentionally or negligently destroyed or altered without providing an opportunity for inspection by the proponent." *Simeone v. Girard City Bd. of Edn.*, 171 Ohio App.3d 633, 2007-Ohio-1775, 872 N.E.2d 344, at ¶ 69. The burden of proof falls on the party alleging spoliation.

{¶ 16} Thus, pursuant to a Crim.R. 16(B)(1)(c) discovery request, when a prosecutor has provided a written transcript that purports to accurately reflect data stored on a computer hard drive, a court may not order an examination of the computer hard drive unless the defense makes a prima facie showing that the state has provided false, incomplete, adulterated, or spoliated evidence.

{¶ 17} Rivas presented no evidence that the state refused to produce material evidence or that it

provided him with false, incomplete, adulterated, or spoliated evidence. Although he makes much of the fact that Wilson continued to use the computer after his arrest and that rebooting a computer changes the data in thousands of files used to start up a computer system, Rivas failed to demonstrate that rebooting a computer would alter the content of the e-mails or files at issue here. Further, even his own expert agreed that "if the officer testified that he reviewed these chats, that they were obviously on his computer screen, he reviewed them immediately after and they do represent an accurate replication of those conversations," continuing to use and reboot the computer would not have affected the accuracy and integrity of the hard copy of the communications produced by the state in its discovery. Rather than specifically testifying that any evidence had in fact been altered, Rivas's expert explained that he could establish the falsification of the state's discovery – assuming any falsification had actually occurred – only by examining the hard drive of the state's computer. However, speculation and conjecture regarding the possibility of material evidence appearing on the hard drive do not demonstrate any inaccuracy in the discovery that the state provided so as to entitle Rivas to inspect the hard drive and verify the accuracy of the transcript. Cf. *United States v. Persico* (E.D.N.Y.2006), 447 F.Supp.2d 213, 217 ("Basing discovery requests on nothing more than mere conjecture renders any request for information outside the ambit of Rule 16 a non-starter"). *Persico* involved a similar factual situation, as the discovery sought included "electronic surveillance recordings and reports, physical surveillance reports and photographs, the names of certain confidential sources with related reports and law enforcement notes, and various telephone toll

records, pen register and pager information," and the defendants contended that only they could discern the existence of impeachment or exculpatory evidence within these materials. Id. at 217-218. Noting the government's representations that it had complied with its discovery obligations, the court explained that "the mere claim that the items sought are 'material' is not enough." Id.

{¶ 18} Ultimately, this is not a case about false or incomplete discovery or a case involving the denial of due process or the violation of Crim.R. 16(B). Here, the state has fully complied with and provided all the discovery required by Crim.R. 16(B). However, based on the speculation of an expert witness and Rivas's unsupported assertion that the transcript has been altered, the court of appeals concluded that Rivas had a right to verify the discovery provided by the state. The appellate court's decision makes the wrong presumption about discovery. The presumption should be that counsel comply with our rules of discovery. Presuming the state's lack of compliance with discovery based on an assertion by an opposing party, and ordering the state to verify its discovery on such an assertion, sends the wrong message to the legal community and does not represent the law of this state.

Conclusion

{¶ 19} In this case, after having received a written transcript purporting to reflect a series of chat-room conversations from the hard drive of a police computer and a compact disc containing an electronic version of files from that hard drive, Rivas asserted a right to verify the accuracy and completeness of the discovery

with which he had been provided by obtaining a mirror image of the computer hard drive.

{¶ 20} However, Rivas failed to provide any evidence to support his allegation that what had been provided to him during the course of discovery lacked accuracy, authenticity, or completeness, and he destroyed or discarded his own computer hard drive, which would have given him the ability to make a prima facie showing that the state had provided false, incomplete, adulterated, or spoliated evidence. Where a party has received discovery pursuant to Crim.R. 16(B)(1)(c), a trial court will not order production of a mirror image of a computer hard drive without a prima face showing that false, incomplete, adulterated, or spoliated evidence has been provided. Here, Rivas submitted a motion to compel discovery that lacked a sufficient evidentiary basis, and he has therefore failed to satisfy his burden of proof.

{¶ 21} Because the state has provided a printed copy of the transcript of the conversations in this instance, and because Rivas has failed to meet his burden of proof to show that the state has provided false, incomplete, adulterated, or spoliated evidence, the state has complied with its obligations pursuant to Crim.R. 16(B)(1)(c), and access to a mirror image of the hard drive of the police computer is not material to the preparation of the defense. We therefore reverse the judgment of the court of appeals.

Judgment reversed.

LUNDBERG STRATTON, O'CONNOR, and LANZINGER, JJ., concur.

MOYER, C.J., and PFEIFER and CUPP, JJ., dissent.

CUPP, J., dissenting.

{¶ 22} Because the majority's holding contrasts with the plain language of Crim.R. 16(B)(1)(c) and because appropriate mechanisms otherwise exist within the Criminal Rules to safeguard from disclosure information not relevant to the defendant's defense, I must respectfully dissent.

{¶ 23} There is no requirement in the discovery provisions of the Criminal Rules that a defendant who wishes to verify the accuracy of the printed version of electronic data stored on a state's computer hard drive must first make a prima facie showing that the state provided false, incomplete, adulterated, or spoliated evidence. Although defendant's basis for asserting a discrepancy between the printed version of the data and the version that resides on the computer hard drive may seem unusual, there is no justification for creating, as the majority opinion does, a permanent judicial gloss over the plain language of the discovery rules to short-circuit defendant's discovery request. Moreover, imposing such a standard ignores the plain language of the rule by imposing obligations on the defendant beyond the rule's "materiality" standard.

{¶ 24} The only limitations in Crim.R. 16(B)(1)(c) are that evidentiary materials must be in the state's possession and must be (1) material to the preparation of defense, (2) intended for use by the prosecuting attorney as evidence at the trial, or (3) obtained from

or owned by the defendant.[1] In this case, the computer hard drive was in the state's possession and was material to defendant's defense theory. Further, the prosecutor intended to use, in printed form, the data contained on the hard drive as part of the state's evidence. Crim.R. 16(B)(1)(c). In contrast to the majority's holding, nothing in the text of Crim.R. 16(B)(1)(c) requires a defendant to demonstrate any threshold indicia of unreliability of the challenged evidence in the state's custody. The trial court should have ordered the state to produce the hard drive for the defendant's inspection or copying. As the appellate court recognized, "forcing a litigant to rely upon an adverse party's representation that a transcript" is accurate without allowing any verification of that accuracy is inconsistent with general notions of a fair trial. *State v. Rivas*, 172 Ohio App.3d 473, 2007-Ohio-3593, 875 N.E.2d 655, ¶ 2.

{¶ 25} Notwithstanding, the state has legitimate reason to prevent defendant's unrestricted access to the data on the computer hard drive. According to the state, the computer hard drive that contains the data sought by defendant also contains data that pertain to

---

[1] The initial obligation to demonstrate that the requested disclosure of a document or tangible object is material to the preparation of a defense has always been placed on the defendant. See, e.g., Crim.R. 16(B)(1)(c) ("Upon motion of the defendant [a court shall permit discovery of documents and tangible items] which are material to the preparation of his defense * * * "); *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 435, 639 N.E.2d 83 (quoting the rule); *United States v. Rhoads* (C.A.8, 1980), 617 F.2d 1313, 1319 (concluding that a defendant failed to demonstrate the manner in which the desired materials were "material to the preparation" of the defense under former Fed.R.Crim.P. 16(a)(1)(C)).

investigations not related to defendant. Simply because a defendant is allowed to inspect and copy the evidence under Crim.R. 16 does not mean that his access to the evidence must be free of all restrictions. Therefore, the defendant's access should be limited to prevent the disclosure of information pertaining to these other matters.

{¶ 26} The methods by which a court may limit a defendant's access to only the information needed for his defense are delineated in Crim.R. 16(E)(1) and (2): the use of protective orders and restrictions on the time, place, and manner of the inspection and copying of evidence. There has been no showing that the trial court in this instance could not have allowed Rivas access to the state's computer hard drive as required by Crim.R. 16(B)(1)(c) while simultaneously protecting the state's interest in not disclosing information pertaining to other investigations through the use of a protective order under Crim.R. 16(E). Indeed, the trial court's initial discovery order allowing for inspection had, in fact, contained the caveat that computer hardware would be inspected, printed, copied, or photographed only in the presence of and under the control of the Xenia Police Department.

{¶ 27} Although the exact form of protective measure – whether by in camera inspection, examination by a third-party expert, or any other means – is a decision best left to the sound discretion of the trial court examining the evidence and facts before it, the fact remains that such a safeguard exists within Crim.R. 16. Rather than improvising a standard that is unsupported by the plain language of the criminal rule and likely to have unforeseen consequences, we should hold that the safeguards

specifically contemplated by the rule should be used to prevent disclosure of information not relevant to a defendant's defense.

{¶ 28} I must respectfully dissent.

MOYER, C.J., and PFEIFER, J., concur in the foregoing opinion.

Stephen K. Haller, Greene County Prosecuting Attorney, and Elizabeth A. Ellis, Assistant Prosecuting Attorney, for appellant.

Law Office of Marc Mezibov, Marc D. Mezibov, and Stacy A. Hinners, for appellee.

APPENDIX B

THE SUPREME COURT OF OHIO

Case No. 2007-1611

[Filed June 3, 2009]

State of Ohio	)
	)
v.	)
	)
Jose A. Rivas	)
	)

RECONSIDERATION ENTRY

Greene County

It is ordered by the Court that the motion for reconsideration in this case is denied.

(Greene County Court of Appeals; No. 05CA147)

/s/ _____
THOMAS J. MOYER
Chief Justice

APPENDIX C

[Cite as *State v. Rivas*, 172 Ohio App.3d 473, 2007-Ohio-3593.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

Appellate Case No. 05-CA-147
Trial Court Case No. 05-CA-33

The STATE OF OHIO,	)
	)
Appellee,	)
	)
v.	)
	)
RIVAS,	)
	)
Appellant.	)
	)

(Criminal Appeal from Common Pleas Court)

OPINION

Rendered on the 13th day of July, 2007.

Stephen K. Haller, Greene County Prosecuting Attorney, and Elizabeth A. Ellis, Assistant Prosecuting Attorney, for appellee.

Marc D. Mezibov and Stacy A. Hinners, for appellant.

FAIN, Judge.

{¶ 1} Defendant-appellant, Jose Rivas, appeals from his convictions for importuning and attempted unlawful sexual conduct with a minor. The charges arose from Rivas's on-line chats with a Xenia police officer posing as a 14-year-old girl whom Rivas arranged to meet at a hotel for sex. Rivas filed a series of pretrial motions regarding discovery issues, after which the case proceeded to a jury trial. The jury found Rivas guilty as charged, and the trial court sentenced him to six months in prison.

{¶ 2} Rivas challenges the trial court's ruling that he not be allowed to make an electronic copy of the police department's computer hard drive on which the original records of the on-line chats were stored. Rivas also maintains that the transcripts of those chats should not have been admitted into evidence, because they were not properly authenticated. Although allowing Rivas to copy the entire hard drive may have compromised other investigations, as well as the privacy of those involved, we conclude that the trial court did have an obligation to conduct an in camera review to verify the accuracy of the copied records that Rivas received. In our view, forcing a litigant to rely upon an adverse party's representation that a transcript from a hard drive accurately reflects the information stored on the hard drive, when that accuracy could be directly verified, is inconsistent with due process. The judgment of the trial court is reversed, and this cause is remanded for further proceedings consistent with this opinion.

I

{¶ 3} In early January 2005, Xenia Police Detective Alonzo Wilson, who works in the Internet Child Protection Unit, entered an America On Line ("AOL") chat room. Within minutes of Alonzo entering the general chat room, and before he had even made any contributions, 36-year-old Rivas contacted Wilson via instant messaging and identified himself as a 19-year-old man. Wilson identified himself as a 14-year-old girl named Molly.

{¶ 4} The conversation quickly became sexual in nature, and Rivas sent a photograph of a young man lying naked on a bed. Much of the chat consisted of Rivas asking Molly about her sexual experience and describing in great detail what sexual acts he wanted to perform on Molly and have performed by Molly on him. Rivas offered Molly $200 and encouraged her to buy a $20 web camera so that she could send him nude photos of herself. Molly did send one photo purporting to be of herself that was actually a photo of another, female detective taken when she was about 14 years old. While the two were making plans to meet for sex, Wilson's computer shut down. By the time he returned to the chat room, Rivas was gone.

{¶ 5} The following day Wilson contacted Rivas through the same chat room. Rivas again offered Wilson $200, and the two arranged to meet for sex at an area hotel later that afternoon. During the course of both conversations, Wilson made several references to being only 14 and not wanting to get pregnant. He also talked of school, homework, and cheerleading, and he told Rivas that he lived with his grandmother.

{¶ 6} Wilson, three other detectives, and a patrol officer set up a surveillance of the hotel. Rivas stopped at a gas station across the street and withdrew $300 from the ATM before checking into the hotel. Rivas paged Wilson with the room number. As the detectives approached the room, Rivas exited. The detectives arrested Rivas, who was carrying $200 in cash, three condoms, and a cell phone.

{¶ 7} Rivas testified in his own defense along with several character witnesses. Rivas disputed the accuracy of more than half of the content of the conversation with Wilson. He denied sending or receiving photos, and he denied claiming to be 19. Moreover, Rivas maintained that there was nothing said that could have led him to believe that he was communicating with a minor. Rivas insisted that he thought he was arranging to meet a 41-year-old woman.

II

{¶ 8} Rivas's First Assignment of Error is as follows:

{¶ 9} "The trial court erred in denying appellant's motion to compel inspection and copying of the computer hard drive."

{¶ 10} In his First Assignment of Error, Rivas argues that the trial court erred in refusing to order the state to allow his expert to make an electronic copy of the police department's computer hard drive. The granting or denial of a motion to compel discovery is reviewed under an abuse-of-discretion standard. The inquiry is whether the trial court's decision is

unreasonable, arbitrary, or unconscionable. *State ex rel. V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 469, 692 N.E.2d 198. While we do not hold that the trial court was required to allow the making of the electronic copy of the hard drive, we do conclude that the trial court abused its discretion by refusing to allow any means for Rivas to be assured that the transcripts provided to him by the police, purporting to represent the information stored on the hard drive concerning his conversation with "Molly," were both complete and accurate.

{¶ 11} In preparation for trial, Rivas filed a motion to preserve all electronic evidence in the possession of the Xenia Police Department regarding the charges against him, and he filed a Crim.R. 16 demand for discovery. The trial court granted both motions, stating that Rivas could inspect the evidence in the presence and under the control of the Xenia Police Department. Citing security concerns, the state refused Rivas's expert access to the police department's hard drive and refused to allow Rivas's expert to make a "mirror image" or "electronic snapshot" of the information stored on the hard drive. The state did provide Rivas with a transcript of the chats both on paper and on disk.

{¶ 12} Claiming that the transcripts were incomplete, Rivas filed a motion to compel discovery. The trial court held that absent any allegations or evidence that the transcripts were inaccurate, Crim.R. 16 did not require that the state provide Rivas with a mirror image of the police department's hard drive. Insisting that the transcripts did not contain the complete record of the internet exchanges between

himself and "Molly," Rivas moved for reconsideration, which the trial court overruled.

{¶ 13} Rivas's defense centers on his claim that he believed that he was communicating with a 41-year-old woman rather than a 14-year-old girl. He denies receiving the photo of Molly. Additionally, he disputes more than half of the conversation, denying all references to Molly going to school, doing homework, cheerleading, living with her grandmother, or in any other way revealing that she was a minor. In order to support his claims, Rivas maintains that he needed access to the police department's hard drive because the only way that he could determine that the copies provided by the police were complete and accurate was to compare them to the information stored on the hard drive.

{¶ 14} The state contends that its interest in safeguarding the details of other investigations justified not allowing Rivas to have access to the hard drive. It is undisputed that the hard drive in question contained information regarding three years of investigation of child-exploitation cases, including many ongoing cases.

{¶ 15} Without adequate discovery, a defendant's ability to prepare a defense is compromised. While the state insists that their witnesses verified the accuracy of the copies, a defendant should not be required to take the word of the adverse party – the police in this case – that a transcript of information stored on a hard drive is accurate, especially where that information constitutes the very crime that the defendant is alleged to have committed.

{¶ 16} While we are sympathetic to the state's concerns, and we agree that there is a sufficient justification to disallow Rivas access to all of the information stored on the hard drive, which includes other investigations having nothing to do with his case, we conclude that the trial court overlooked a means of protecting that interest while also protecting Rivas's right to a determination of the accuracy of the transcript provided by the state.

{¶ 17} In camera reviews are used by trial courts in many instances. Here, perhaps with the assistance of an expert of its own choosing, the trial court could have compared the information on the hard drive with the transcripts provided to Rivas by the state. The trial court would then be in a position to determine whether the copies were complete and accurate.

{¶ 18} One important aspect of the right to a fair trial is the right of the accused to confront the evidence against him. This is normally thought of as the right to confront witnesses, enshrined in the Sixth Amendment to the Constitution of the United States and Section 10, Article I of the Ohio Constitution. Increasingly, the testimony of witnesses may actually be less important to the outcome of a criminal trial than demonstrative evidence. Examples of this trend include DNA evidence in a criminal case and blood-alcohol tests in prosecutions for driving with a prohibited concentration of alcohol in the blood. Preventing an accused from having a reasonable means of verifying that a transcript, prepared by his adversary, the state, accurately and completely reflects direct evidence, in the state's possession, of the very conversation allegedly constituting the crime with which the accused is charged is, in our view,

inconsistent with the accused's fair-trial right to confront the evidence against him.

{¶ 19} Where there is direct evidence of a conversation allegedly constituting the crime with which a defendant is charged, we hold that the right to a fair trial, embodied in the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and in Section 10, Article I of the Ohio Constitution, includes the right of the defendant to some reasonable means of verifying that a purported transcript of the conversation, prepared from the direct evidence by the adverse party, is accurate and complete.

{¶ 20} Rivas's First Assignment of Error is sustained.

III

{¶ 21} Rivas's Second Assignment of Error is as follows:

{¶ 22} "The trial court erred in admitting into evidence at trial the state's unauthenticated paper printouts of electronic data."

{¶ 23} Because we have sustained Rivas's First Assignment of Error, his Second Assignment of Error is rendered moot, and we need not address the merits of this claim

IV

{¶ 24} Rivas's First Assignment of Error having been sustained, the judgment of the trial court is

reversed, and this cause is remanded for further proceedings consistent with this opinion.

Judgment accordingly.

BROGAN and VALEN, JJ., concur.

ANTHONY VALEN, J., retired, of the Twelfth Appellate District, sitting by assignment.

APPENDIX D

IN THE COMMON PLEAS COURT
OF GREENE COUNTY, OHIO
CRIMINAL DIVISION

Case No. 05 CR 33

[Filed February 25, 2005]

STATE OF OHIO,	)
	)
Plaintiff	)
	)
vs.	)
	)
JOSE A. RIVAS,	)
	)
Defendant	)
	)

JUDGE CAMPBELL

DEFENDANT'S SUPPLEMENTAL
MOTION FOR DISCOVERY

Now comes Defendant by his undersigned counsel and hereby moves this Court for an Order permitting discovery as set forth below.

Respectfully submitted,

MILLER, FINNEY, McKEOWN & BAKER

/s/
Christ Theodor, Esq. (#0020042)
Attorney for Defendant Jose A. Rivas
20 King Avenue
P. O. Box 610
Xenia, Ohio 45385-0610
Telephone: (937) 372-8055
Facsimile: (937) 374-4545

MEMORANDUM

On February 9, 2005, Defendant filed a Motion for Discovery pursuant to Rule 16, ORCrP, and a Motion for Preservation Order. Defendant now files this supplemental motion for discovery for certain electronic evidence and data relevant to the reliability, trustworthiness and authenticity of computer e-mail communication alleged to incriminate Defendant.

Pursuant to ORCrP 16, Defendant moves this Court for an order requiring the State of Ohio to make available to Defendant's counsel and retained forensic computer expert, at an agreed-upon time, all electronic evidence relevant to this case, including but not limited to the following:

1. All text files (including word processing documents); and

2. Spreadsheets, e-mail files and information concerning e-mails (including logs of e-mail history and usage, header information and deleted filed); and

3. Internet history files and preferences, graphical image format (GIF) files, databases, calendar and

scheduling information, computer system activity logs, chat logs; and

4. All Encase images made of Xenia Police Department machines/computers at the end of every chat session with Defendant and all backup files containing electronic data.

Virtually all of the evidence alleged to incriminate the Defendant consists of computer printouts of alleged conversations with Defendant. Anything can be printed, but the integrity of the printed document is only as trustworthy, reliable and authentic as the system containing the electronic data. There are numerous and extensive requirements and procedures necessary to adequately preserve electronic data so as to establish its trustworthiness and admissibility as evidence. For that reason, it is imperative that Defendant has access to the above-mentioned information to prepare his defense and adequately confront the evidence and witnesses against him.

THEREFORE; Defendant respectfully requests that the State of Ohio be ordered to produce the requested information at a time and place adequate for review by Defendant's expert.

/s/
Christ Theodor, Esq. (#0020042)
Attorney for Defendant Jose A. Rivas

* * *

[Certificate of Service Omitted in Printing of this Appendix]

APPENDIX E

IN THE COMMON PLEAS COURT
OF GREENE COUNTY, OHIO

Case No. 2005 CR 33

[Filed March 11, 2005]

STATE OF OHIO	)
	)
Plaintiff	)
	)
-vs-	)
	)
JOSE A. RIVAS	)
	)
Defendant	)
	)

JUDGMENT ENTRY

This matter is before the Court upon the Defendant's Rule 16 Demand for Discovery filed February 9, 2005; Defendant's Motion for Preservation Order and Memorandum in support thereof with attachment filed February 9, 2005, and Defendant's Supplemental Motion for Discovery and Memorandum in support thereof filed February 25, 2005. No response has been filed by the State of Ohio within the time allotted by the Rules to any of the motions.

The Motion for Preservation Order is sustained and the Xenia Police Department is ordered to preserve all electronic data contained in its computer systems as relates to the Defendant, Jose A. Rivas, and the charges in question.

Defendant's Rule 16 Demand for Discovery and Supplemental Motion for Discovery are sustained and reciprocal discovery in accordance with Rule 16 is hereby ordered. Any and all computer files or other computer related evidence that is discoverable pursuant to Rule 16 will either be provided to the Defendant or the Defendant will be given the opportunity to review, photograph, copy or print such items, however, original computer files, spreadsheets, documentation, hardware, software or any other related computer items will be inspected and/or printed or copied or photographed only in the presence of and under the control of the Xenia Police Department. Any arrangements to accomplish the carrying out of this Order will be handled by counsel.

SO ORDERED.

/s/ J. Timothy Campbell
J. TIMOTHY CAMPBELL, JUDGE
03-10-05

APPENDIX F

IN THE COMMON PLEAS COURT
OF GREENE COUNTY, OHIO
CRIMINAL DIVISION

Case No. 2005 CR 33

[Filed July 12, 2005]

STATE OF OHIO	)
	)
Plaintiff	)
	)
-vs-	)
	)
JOSE A RIVAS	)
	)
Defendant	)
	)

(JUDGE CAMPBELL)

JUDGMENT

This matter came before the Court upon the Motion to Compel Discovery and the Memorandum in support thereof with attachments filed June 24, 2005 and the State of Ohio's Memorandum in Response to Motion to Compel Discovery filed June 30, 2005.

The Court scheduled and held a hearing on the Motion to Compel on July 7, 2005 and heard testimony

from Mark T. Vassel on behalf of the Defendant. Defendant requested a "mirror image" of the Xenia Police Department's hard drive on their computer for Defendant's forensic computer analysis. The Defendant claims that he needs the "mirror image" in order to ensure that the compact disc provided by the State of Ohio, pursuant to Rule 16 for purposes of discovery, was not compromised in any way. Defendant offers no evidence, testimony or otherwise to indicate that the compact disc information is not authentic and complete and when defense counsel was asked why the content of the compact disc could not be compared against the Defendant's own hard drive to which they would have access, apparently the Defendant destroyed or disposed of his own hard drive.

The Court has reviewed Criminal Rule 16 and finds nothing within that rule that would require the State of Ohio to provide a "mirror image" of its hard drive to the Defendant as a result of criminal discovery in the absence of allegations and some evidence that what has been provided is not accurate.

The Court **OVERRULES** the Defendant's Motion to Compel.

SO ORDERED.

/s/ J. Timothy Campbell
J. TIMOTHY CAMPBELL, JUDGE
07-12-05

* * *

[Service Information Omitted in Printing of this Appendix]

APPENDIX G

IN THE COMMON PLEAS COURT
OF GREENE COUNTY, OHIO
CRIMINAL DIVISION

Case No. 2005 CR 33

[August 16, 2005]

STATE OF OHIO	)
	)
Plaintiff	)
	)
-vs-	)
	)
JOSE A. RIVAS	)
	)
Defendant	)
	)

(JUDGE CAMPBELL)

JUDGMENT

This matter came before the Court for hearing on the Defendant's Motion to Suppress and Amended Motion to Suppress filed by defense counsel.

On July 18, 2005, the Defendant also filed a Motion for Reconsideration of the Court's Decision denying that a mirror image of the hard drive of the Xenia Police Department's computer be provided to the

Defendant. The Court **OVERRULES** the Motion for Reconsideration.

Regarding the Motion to Suppress, the Court heard testimony from Mark Vassel a patrolman with the Olmstead Township Police Department who handled computer sex crime investigations. The Court also heard testimony hm Det. Alonzo Wilson of the Xenia Police Department and the Court admitted into evidence Defendant's Exhibits A, B, and C and State's Exhibit 1.

The issue in this case revolves around the Defendant's contention that he should be provided with a mirror image of the Xenia Police Department's hard drive from the computer utilized to generate the chat log which forms the basis of the charges against the Defendant.

Defendant's witness, Mark Vassel, maintains that the integrity of the evidence is compromised as a result of continuous booting of the computer and other uses of the hard drive not necessarily related to this case and that the only way to verify the accuracy of the chat log is to provide a mirror image of the police department's hard drive. Mr. Vassel testified that in cases handled by him, his department uses a 6.4 gig hard drive for each case and replaces the hard drive each time they investigate a different case.

Det. Wilson testified that the chat log in question, identified as State's Exhibit 1, involved conversations on January 3, 2005 and January 4, 2005 and that the chat log was printed directly from the police department's hard drive on January 4, 2005. Mr. Vassel indicated that he had no reason to believe that

State's Exhibit 1 is not accurate other than the fact that he feels the hard drive is better evidence than a hard copy printed chat log as evidenced by State's Exhibit 1.

While the Defendant has requested a mirror image of the hard drive, the Defendant has made no claim that State's Exhibit 1 is inaccurate. As mentioned in the Court's previous decision regarding a denial of the mirror image of the hard drive, the Defendant had evidently destroyed or discarded his own hard drive which would have given the Defendant some basis to claim an inaccuracy, if one in fact did exist. It is apparent that the Defendant is looking for something inaccurate but does not how what inaccuracy he is looking for and the Defendant's own witness could not say that State's Exhibit 1, printed out immediately after the conversation, would not be accurate. All of the Defendant's claims regarding rebooting of the computer and other activity after the printout date of January 4, 2005 would not have affected the printout.

The evidence in this case is the chat log between the police officer posing as a minor and the Defendant. There has been no testimony or evidence presented to the Court to indicate that that chat log has been altered or compromised in any way.

Consequently, the Motion to Suppress and the Amended Motion to Suppress filed by the Defendant are **OVERRULED** in their entirety.

Final Pre-Trial is scheduled for **August 22, 2005 at 9:00 A.M.** and **Jury Trial** is scheduled for **August 24, 2005 at 9:00 A.M.**

SO ORDERED.

/s/ J. Timothy Campbell
J. TIMOTHY CAMPBELL, JUDGE
08-16-05

* * *

[Service Information Omitted in Printing of this Appendix]

APPENDIX H

Ohio Rules of Criminal Procedure
RULE 16. Discovery and Inspection

(A) Demand for discovery. Upon written request each party shall forthwith provide the discovery herein allowed. Motions for discovery shall certify that demand for discovery has been made and the discovery has not been provided.

(B) Disclosure of evidence by the prosecuting attorney.

(1) Information subject to disclosure.

(a) Statement of defendant or co-defendant. Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect the copy or photograph any of the following which are available to, or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:

(i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof;

(ii) Written summaries of any oral statement, or copies thereof, made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer;

(iii) Recorded testimony of the defendant or co-defendant before a grand jury.

(b) Defendant's prior record. Upon motion of the defendant the court shall order the prosecuting attorney to furnish defendant a copy of defendant's prior criminal record, which is available to or within the possession, custody or control of the state.

(c) Documents and tangible objects. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant.

(d) Reports of examination and tests. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, available to or within the possession, custody or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney.

(e) Witness names and addresses; record. Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a

written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. Where a motion for discovery of the names and addresses of witnesses has been made by a defendant, the prosecuting attorney may move the court to perpetuate the testimony of such witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(f) **Disclosure of evidence favorable to defendant.** Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment. The certification and the perpetuation provisions of subsection (B)(1)(e) apply to this subsection.

(g) **In camera inspection of witness' statement.** Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and

participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Information not subject to disclosure. Except as provided in subsections (B)(1)(a), (b), (d), (f), and (g), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case or of statements made by witnesses or prospective witnesses to state agents.

(3) Grand jury transcripts. The discovery or inspection of recorded proceedings of a grand jury shall be governed by Rule 6(E) and subsection (B)(1)(a) of this rule.

(4) Witness list; no comment. The fact that a witness' name is on a list furnished under subsections

(B)(1)(b) and (f), and that such witness is not called shall not be commented upon at the trial.

(C) Disclosure of evidence by the defendant.

(1) Information subject to disclosure.

(a) Documents and tangible objects. If on request or motion the defendant obtains discovery under subsection (B)(1)(c), the court shall, upon motion of the prosecuting attorney order the defendant to permit the prosecuting attorney to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, available to or within the possession, custody or control of the defendant and which the defendant intends to introduce in evidence at the trial.

(b) Reports of examinations and tests. If on request or motion the defendant obtains discovery under subsection (B)(1)(d), the court shall, upon motion of the prosecuting attorney, order the defendant to permit the prosecuting attorney to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, available to or within the possession or control of the defendant, and which the defendant intends to introduce in evidence at the trial, or which were prepared by a witness whom the defendant intends to call at the trial, when such results or reports relate to his testimony.

(c) Witness names and addresses. If on request or motion the defendant obtains discovery under subsection (B)(1)(e), the court shall, upon motion of the

prosecuting attorney, order the defendant to furnish the prosecuting attorney a list of the names and addresses of the witnesses he intends to call at the trial. Where a motion for discovery of the names and addresses of witnesses has been made by the prosecuting attorney, the defendant may move the court to perpetuate the testimony of such witnesses in a hearing before the court in which hearing the prosecuting attorney shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the defendant's case in chief in the event the witness has become unavailable through no fault of the defendant.

(d) In camera inspection of witness' statement. Upon completion of the direct examination, at trial, of a witness other than the defendant, the court on motion of the prosecuting attorney shall conduct an in camera inspection of the witness' written or recorded statement obtained by the defense attorney or his agents with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist the statement shall be given to the prosecuting attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the prosecuting attorney, and he shall not be permitted to cross-examine or comment thereon.

Whenever the prosecuting attorney is not given the entire statement it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Information not subject to disclosure. Except as provided in subsections (C)(1)(b) and (d), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the defense attorney or his agents in connection with the investigation or defense of the case or of statements made by witnesses or prospective witnesses to the defense attorney or his agents.

(3) Witness list; no comment. The fact that a witness' name is on a list furnished under subsection (C)(1)(c), and that the witness is not called shall not be commented upon at the trial.

(D) Continuing duty to disclose. If, subsequent to compliance with a request or order pursuant to this rule, and prior to or during trial, a party discovers additional matter which would have been subject to discovery or inspection under the original request or order, he shall promptly make such matter available for discovery or inspection, or notify the other party or his attorney or the court of the existence of the additional matter, in order to allow the court to modify its previous order, or to allow the other party to make an appropriate request for additional discovery or inspection.

(E) Regulation of discovery.

(1) Protective orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party the court may permit a party to make such showing, or part of such showing, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Time, place and manner of discovery and inspection. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted, and may prescribe such terms and conditions as are just.

(3) Failure to comply. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(F) Time of motions. A defendant shall make his motion for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later

as the court may permit. The prosecuting attorney shall make his motion for discovery within seven days after defendant obtains discovery or three days before trial, whichever is earlier. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

[Effective: July 1, 1973.]

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(2)

No. 09-278

Supreme Court, U.S.
FILED
OCT 5 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOSE A. RIVAS,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

BRIEF IN OPPOSITION

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Counsel for Respondent

October 5, 2009

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QUESTION PRESENTED

Whether Ohio's discovery rule, which protects otherwise confidential law enforcement investigatory records from copying and release in the absence of a prima facie showing that the state has already provided false, incomplete, adulterated, or spoilated evidence, violates the Due Process Clause of the United States Constitution?

LIST OF PARTIES

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STATEMENT

1. In 2005, Detective Alonzo Wilson of the Xenia, Ohio Police Department was posing as a 14-year-old girl on an internet chat room. The Petitioner, Jose A. Rivas, then 36, solicited sex from this purported 14-year-old and drove from Cincinnati, Ohio to Xenia, Ohio to meet her at a hotel. The Defendant was indicted for Importuning, a violation of Ohio Revised Code (O.R.C.) 2907.07(D)(2), a felony in the fifth degree; and Attempted Unlawful Sexual Conduct With a Minor, a violation of O.R.C. 2907.04(A), a felony in the fourth degree.

During the pre-trial proceedings, the Petitioner filed a motion to compel inspection and copying of the Xenia Police Department's computer hard drive under Ohio Rule of Criminal Procedure 16. The trial court held a hearing on the motion, and the Petitioner called his expert, Mark T. Vassel, to testify. Mr. Vassel testified that the only way for him to examine the State's evidence against Petitioner is for him to have a "mirror image" of the police department's computer hard drive. Vassel testified that a mirror image is the only way to ensure that the electronic copy of evidence previously provided by the State on compact disc was not compromised in any way.

The trial court overruled the motion to compel, finding that the Petitioner offered no evidence or testimony to indicate that the electronic copy provided was compromised. The Court further noted that the Petitioner could have compared the evidence provided to his own hard drive, but the Petitioner destroyed or disposed of his own hard drive. The case proceeded to trial. Detective Wilson testified at the trial and the

Petitioner was found guilty as alleged in both counts of the indictment.

It is important to note that the Petitioner never requested to examine the State's computer in the custody and control of the State. The Petitioner insisted on obtaining a copy of the police department's hard drive, which also contained pending and ongoing investigations of other suspects.

2. The Petitioner appealed the trial court's ruling to the Court of Appeals of Ohio, Second Appellate District alleging the following assignments of error: 1.) The trial court erred in denying appellant's motion to compel inspection and copying of the computer hard drive; and 2.) The trial court erred in admitting into evidence at trial the State's unauthenticated paper printouts of electronic data. The Second District affirmed the first assignment of error and held that the trial court erred in overruling the Petitioner's Motion to Compel because:

> [w]hile the State insists that their witnesses verified the accuracy of the copies, a defendant should not be required to take the word of the adverse party - the police in this case - that a transcript of information stored on a hard drive is accurate, especially where that information constitutes the very crime that the defendant is alleged to have committed.

3. Respondent, the State of Ohio, appealed this decision to the Ohio Supreme Court, arguing that the Court of Appeals abused its discretion and substituted its judgment for that of the trial court, and that the concerns raised by Petitioner regarding the evidence

were unfounded based upon the record. The State further sought to protect this sort of evidence from unnecessary disclosure to multiple parties, especially when other portions of the hard drive contained active investigations, officer screen names, and investigatory techniques. Further complicating the disclosure of this material is that some of the other investigations contained on the hard drive involve pornagraphic images, including those of children, which the State cannot copy without violating federal laws against child pornography. See *State v. Brady*, 119 Ohio St. 3d 375, 2008-Ohio-4493. The State reasoned that this is a unique case where there will always be two copies of the original chat transcript - one on law enforcement's hard drive and the other on the computer used by the defendant.

The Supreme Court of Ohio agreed, and held that where a party has received discovery pursuant to Ohio Crim. R. 16(B)(1)(c), a trial court will not order a production of a mirror image of a computer hard drive without a prima facie showing that false, incomplete, adulterated, or spoilated evidence has been provided. *State v. Rivas*, 121 Ohio St. 3d 469, 2009-Ohio-1354, at ¶20. The Court further specifically found that this was not a case involving the denial of due process since the State fully complied with Ohio's Rules of Discovery. *Id.* at ¶18.

Respondent - State of Ohio agrees that there is no due process violation in imposing a burden upon a defendant to show that he is entitled to more discovery than the procedural rules allow. The Respondent further submits that there is no per se Constitutional right to discovery, and that state discovery rules that do not violate due process are best left to State courts

to interpret and enforce under the Tenth Amendment. Further, a state government has a legitimate interest in protecting the hard drives of their investigatory computers, and the lower court's holding effectively balances that need with the need for a defendant to examine the evidence against him. Accordingly, there is no Constitutional question in this case and there is no need for this Court to accept certiorari.

REASONS FOR DENYING THE PETITION

I. There is no need for this Court to accept certiorari in this case, as there is no Constitutional issue. Further, certiorari is not appropriate in this matter as the Petitioner's arguments are belied by the record.

Petitioner is asking this Court to read into the Sixth and Fourteenth Amendments of the Constitution of the United States a defendant's right to examine the prosecution's physical trial evidence against him. Respondent respectfully submits that holding so would undermine the long-recognized rule allowing a state to regulate criminal procedural matters. This Court has previously held that, "it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *Leland v. Oregon*, 343 U.S. 790, 798 (1952);

Snyder v. Massachusetts, 291 U.S. 97." *Patterson v. New York*, 432 U.S. 197, 201-202 (1977).

A discovery rule that imposes an easily attainable burden on a defendant to obtain evidence in addition to what is required under the rules of discovery is hardly offensive to the fundamentals of our justice system. It is the position of the Respondent that if the record were not so devoid of any evidence of impropriety on the part of the Detective, the Petitioner would have easily met his burden and been permitted to examine the hard drive. Indeed, the rule as announced by the Supreme Court of Ohio does not prevent disclosure of a law enforcement hard drive in all cases, just in those cases where the record does not support disclosure.

The concerns of the Petitioner in this case are not supported by evidence in the record. The Petitioner's essential argument at the motion to compel discovery is that the transcript of the online chat submitted by the police in discovery was altered, without any support whatsoever, during the booting and rebooting of the computer, and transposed the age of the person that Rivas believed he was chatting with from 41 to 14. Petitioner's expert testified that the only way that he could verify that the chat was accurate was to examine a mirror image of the law enforcement's hard drive. The record reveals however that Detective Wilson printed out the chat transcript immediately after finishing the chat and did not boot or reboot the computer between finishing the chat and printing the transcript. (Tr. 8/11/05, p.19). Further, Petitioner's expert conceded that if the chat transcripts in question were printed immediately after the chat, and the Detective testified under oath that the transcripts

were a fair and accurate representation of the conversation he had with the Petitioner, the question of the integrity of the chats and the hard drive are diminished. (*Id.*, p. 62, 68).

Additionally, throughout the chats, the Petitioner engages in numerous conversations with "Molly" about school, homework, and getting in trouble with her grandmother. It is doubtful that any 41 year old woman would be worried about getting in trouble with her grandmother for checking her email before doing homework. Therefore, even if the computer somehow magically transposed 41 to 14, there is no evidence that it could invent the language contained in the rest of the transcript.

Moreover, the Petitioner sent a naked picture of a much younger man during the initial chat and told "Molly" that he was 19 instead of 36. It is not logical that he would be concerned about appearing younger if he is having a conversation with a 41 year old. The Detective also sent the Petitioner a picture of a present day adult when she was 14 year old girl. Finally, the Petitioner's own hard drive contained the same chat log as the Detective's. If the transcript truly revealed that the Petitioner believed he was talking with a 41 year old woman, it is not likely that he would have erased it. As such, the trial court appropriately held that he was not entitled to the production of the hard drive, absent a showing of some defect. Again, his own witness testified that if the Detective printed the chat logs almost immediately after the conclusion of the chat, and he reviewed the logs and found that they represent an accurate replication of the conversations with the Petitioner, his concerns as to authenticity are minimized or eliminated. (TR 8/15/05 p.68)

Moreover, the State disagrees with Petitioner's assertion that *Brady v. Maryland*, 373 U.S. 83 (1963) does not resolve this issue. Under *Brady*, it is well-settled that if the state has in its possession any evidence material to guilt or innocence that is favorable to a criminal defendant and fails to disclose this to a defendant, a prosecutor violates due process. An interpretation of *Brady* to create a broad, constitutionally required right of discovery "would entirely alter the character and balance of our present systems of criminal justice." *Giles v. Maryland,* 386 U.S. 66, 117, 87 S.Ct. 793, 818, 17 L.Ed.2d 737 (1967) (dissenting opinion). Thus, *Brady* imposes a duty upon all state and federal prosecutors to disclose all favorable material evidence to an accused, and prosecutors should be presumed to comply with this rule and the rules of discovery.

The case at bar does not change the rule in *Brady*. It merely holds that if a criminal defendant wants a copy of law enforcement's entire hard drive, which is more than what is required under the rules of discovery, he or she must make a prima facie showing that the evidence already provided is inaccurate. This showing is not unduly burdensome in this case as a defendant will always have access to the other original transcript of the chat on the computer he used. All he would have to do is print out a transcript of the chat log as he perceived it, and submit it to the court for consideration, or demonstrate that the police procedures employed were defective or compromised the evidence. That would certainly be sufficient to meet the prima facie showing. The fact that the Petitioner destroyed his own hard drive after arrest is hardly reason to hold that the state should be compelled to produce a copy of its hard drive, absent

any other evidence that it is inaccurate or spoilated, nor should it create a constitutional right to copy otherwise confidential evidence.

II. The holding of the Supreme Court of Ohio below does not violate the Sixth Amendment right of confrontation.

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court interpreted the Sixth Amendment right to confront witnesses to mean that a witness's testimony against a defendant is inadmissible unless the witness appears at trial, or if unavailable, the defendant had a prior opportunity to cross-examine the witness. *Id.* at 54. In *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), this Court recently extended the principles of Crawford to apply to affidavits, prepared out of court by forensic scientists, regarding the chemical make-up and quantities of suspected drugs. At issue in *Melendez-Diaz* is a Massachusetts statute that allowed for the admission of affidavits of forensic chemists in drug cases in lieu of any testimony, and if a defendant wanted the testimony of the chemist, the defendant (and not the state or commonwealth) would have to subpoena the chemist.

The State of Ohio submits that this line of cases have no application to the case at bar. Indeed, this Court has previously held that the ability to question an adverse witness under the Confrontation Clause does not include power to require pre-trial disclosure of any and all information that might be useful *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987). Detective Wilson chatted with the Petitioner online, printed out the transcript, and testified to his recollection of the conversation, and also testified that

the printed transcript fairly and accurately represented the conversation with the Petitioner. Detective Wilson is the witness against the Petitioner and the Petitioner not only had the opportunity to cross-examine him, but did cross-examine him.

III. The holding of the Supreme Court of Ohio below does not violate the Fourteenth Amendment right to due process.

There is simply no evidence in the record to demonstrate that the Petitioner was denied a fair trial. A criminal defendant has a due process right to discovery of evidence that is material to that defendant's guilt or punishment. *State v. Hesson* (1996), 110 Ohio App. 3d 845, qtg. *Brady v. Maryland* (1963), 373 U.S. 83. However, this Court has previously defined the category of criminal law infractions that violate 'fundamental fairness' very narrowly based on the recognition that, "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Medina v. California*, 505 U.S. 437,443 (1992), qtg. *Dowling v. United States,* 493 U.S. 342, 352, 110 S.Ct. 668, 674, 107 L.Ed.2d 708 (1990); accord, *United States v. Lovasco,* 431 U.S. 783, 790, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752 (1977). In *Medina*, this Court further noted that the Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order. *Medina*, 505 U.S. at 443. "[I]t has never been thought

that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Id.*, qtg. *Spencer v. Texas,* 385 U.S. 554, 564 (1967).

Further, the right to discovery does not entitle a defendant "to the pre-trial disclosure of all information that might be useful in contradicting unfavorable testimony and does not enable her to search through all of the state's files" *Hesson*, 110 Ohio App. 3d 845, qtg. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). In *Ritchie*, this Court held that a defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the state's or commonwealth's files. *Id.* at 59. This Court further noted:

> Although the eye of an advocate may be helpful to a defendant in ferreting out information, *Dennis v. United States,* 384 U.S. 855, 875 (1966), this Court has never held-even in the absence of a statute restricting disclosure-that a defendant alone may make the determination as to the materiality of the information. Settled practice is to the contrary. In the typical case where a defendant makes only a general request for exculpatory material under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance.

> See *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977) ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one"). *Id.* at 59-60.

It is clear then, that the rule of criminal procedure in the case at bar only violates due process if it is Constitutionally impermissible to place a burden on a defendant to make a prima facie showing that the evidence already provided is false, incomplete, adulterated or spoilated before allowing said defendant access to additional information. This simply cannot be in light of the fact that the burden placed upon the Respondent is slight and Constitutionally sound, especially when compared to cases involving the destruction of evidence.

When evidence is destroyed in a criminal case before the completion of the case, courts apply two different standards depending on whether the evidence destroyed was materially exculpatory or potentially useful. *See Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988). To be materially exculpatory, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 2534 (1984). Evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *State v. Scurlock* , Licking App. 05 CA 116, 2006 Ohio 4445, ¶29, *qtg. State v. Johnson* (1988) 39 Ohio St. 3d 48, 529 N.E. 2d 898, ¶5 of the syllabus. If the State

fails to preserve evidence that is materially exculpatory, the defendant's rights have been violated; however, courts have consistently held that the burden of proof is on the defendant to show the exculpatory nature of the destroyed evidence. See *Id.*

In contrast, if the State fails to preserve evidence that is potentially useful, the defendant's rights have been violated only upon a showing of bad faith. *Id.* at ¶30. 'Bad faith' implies something more than bad judgment or negligence, it imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud and embraces actual intent to mislead or deceive another. *Id.* Again, the burden is on the defendant to show 'bad faith' on the part of the State when dealing with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988).

Thus, if it is Constitutionally permissible to impose a burden on a defendant to make a showing that evidence is material or the State is acting in bad faith, it then follows that it is permissible to require a defendant to make a prima facie showing that the evidence presented by the State is false, incomplete, adulterated, or spoilated.

CONCLUSION

Given the entire record and Detective Wilson's testimony in the case at bar, there is no reasonable probability the result of the trial would have been different had the Defendant been granted access to the Xenia Police Department's hard drive. Accordingly, there has been no violation of the Petitioner's Confrontation or Due Process rights. Further, the burden placed upon the Petitioner is slight when compared to the government's need for maintaining the confidentiality of its other current investigations. Therefore, there is no Constitutional deprivation by the holding of the Supreme Court of Ohio and this Court should deny Certiorari.

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In The
Supreme Court of the United States

JOSE A. RIVAS,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The State of Ohio contends that certiorari should not be granted in this case because Petitioner's claim does not implicate the United States Constitution. To support this assertion, the State relies upon a misapplication of the relevant case law and attempts to obfuscate the record by mischaracterizing Petitioner's narrowly tailored pre-trial discovery request as nothing more than a "fishing expedition" which would compromise the State's interest in protecting its confidential law enforcement investigatory records.

In addition to the factual and legal inaccuracies in the State's argument, its position overlooks fundamental principles of fairness deeply rooted in the Fourteenth Amendment's Due Process Clause and this Court's constitutional jurisprudence. Specifically, it fails to recognize that Ohio's new rule of discovery will effect a significant shift in the delicate balance of power between the prosecution and criminal defendant that will leave the accused without meaningful recourse to challenge the validity, authenticity or accuracy of the evidence presented against him at trial. Such a rule, if permitted to stand, will clearly abridge criminal defendants' well established constitutional right to mount a complete defense.

Under these circumstances, the Petition should be granted, the ruling of the Ohio Supreme Court overturned and this matter remanded for further proceedings.

I. PETITIONER WAS DENIED A FUNDAMENTAL RIGHT SECURED BY THE UNITED STATES CONSTITUTION.

A. Petitioner's request to inspect the hard drive was not a fishing expedition but rather a specific request for material evidence.

The State paints Petitioner's request to inspect the police department's computer hard drive as an attempt to gain unfettered access to the State's investigative files and cites an abundance of case law supporting its position that such broad requests are impermissible under the rules of discovery. Opp. 10-11. However, because Petitioner's request was both pointed and material, the State's argument in this regard should be rejected.

Prior to trial, Petitioner specifically requested to inspect the prosecution's computer hard drive because he believed that the electronic information generated by that hard drive had been altered and that the computer printout provided to him did not accurately reflect his online conversation with the undercover police officer. The request was material because if, as Petitioner has steadfastly asserted, the hard drive indicated that the police officer had actually represented the age of Molly to Petitioner as 41 instead of 14, such evidence could reasonably put the State's charges of Importuning and Unlawful Sexual Conduct with a Minor "in a different light" and undermine a jury verdict arrived at in the absence of such evidence. See *Cone v. Bell*, 129 S.Ct. 1769, 1783 (2009).

Under this set of facts, it is clear that Petitioner was not merely engaging in a fishing expedition for potentially relevant information nor was he requesting unfettered access to the State's confidential files. Opp. at 10. Rather, Petitioner was requesting to inspect the physical evidence to be used against him in the prosecution's case in chief which was material to his guilt or innocence and in the exclusive possession and control of the State.

Despite the language in Ohio Crim.R.16(B)(1)(C) granting a criminal defendant the right to inspect items "material to the preparation of his defense," and the apparent materiality of the hard drive, the prosecution refused to allow Petitioner to inspect the original source of the data. The Ohio Supreme Court affirmed this decision, ruling that in order to obtain discovery Petitioner must first make a prima facie showing that the computer printout was "false, incomplete adulterated or spoliated" before being permitted to inspect the evidence.

B. This Court has the power to overturn the Ohio Supreme Court's unconstitutional interpretation of a state criminal rule of procedure.

The State asserts that because the Ohio Supreme Court determined that the prosecution complied with Ohio's rules regarding pre-trial discovery, this is necessarily "not a case involving a denial of due process." Opp. 3, citing *State v. Rivas*, 121 Ohio St.3d 469 at ¶18. While petitioner recognizes that it is generally within the power of the states to regulate procedures under which their criminal laws are carried out, this policy does not wholly free state rules

of criminal procedure from constitutional scrutiny. See *Patterson v. New York*, 432 U.S. 197, 202 (1977); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).

Rather, "cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." *Spencer v. Texas*, 385 U.S. 554, 563-564 (1967). State rules and decisions that "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental" will be deemed to violate the Due Process Clause of the Fourteenth Amendment. *Speiser v. Randall*, 357 U.S. 513, 523 (1958).

Further, much of this Court's hesitation to intervene in the states' administration of their individual criminal justice systems derives from a desire to "exercise substantial deference to legislative judgments in this area." *Medina v. California*, 505 U.S. 437, 446 (1992). In this instance, however, Petitioner is not requesting that the Court overturn a legislative enactment, but rather correct an error of constitutional magnitude made by the highest court of the state in interpreting a rule of procedure. As the three dissenting state court justices recognized:

> There is no justification for creating, as the majority opinion does, a permanent judicial gloss over the plain language of the discovery rules to short-circuit defendant's discovery request. Moreover, imposing such a standard ignores the plain language of the rule by imposing obligations on the defendant beyond the rule's "materiality" standard. *State v. Rivas*, 121 Ohio St.3d 469 at ¶23.

Under these circumstances, it is clear that Ohio's new judicially created rule of criminal procedure can—and indeed should—be scrutinized by this Court to determine whether it comports with the fundamental fairness requirements rooted in the United States Constitution.

C. The Supreme Court of Ohio's reformulation of Ohio Rule of Criminal Procedure 16 violates the Due Process Clause of the Fourteenth Amendment.

The State maintains that Ohio's new rule of discovery requiring a criminal defendant to show that a computer printout is false, incomplete adulterated or spoliated" before being permitted to see the original source of the data is not violative of the Due Process Clause." Opp. at 9-12. However, this analysis fails to acknowledge the role of due process in maintaining a balance of power in criminal proceedings—a balance that has now been unconstitutionally shifted in favor of the State.

It is well settled that the Due Process Clause "speak[s] to the balance of forces between the accused and the accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973), citing *In re Winship*, 397 U.S. 358, 361-364 (1970). To maintain this balance, Courts and legislatures have endeavored to craft rules of discovery and procedure which afford criminal defendants the tools needed to ensure that they receive "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Indeed, "the State's inherent information gathering advantages suggest that if there is to be any imbalance in

discovery rights, it should work in the defendant's favor." *Wardius*, 412 U.S. at Fn9.

Under these principles, virtually every jurisdiction in the United States permits a criminal defendant to inspect evidentiary materials in the State's possession so long as the evidence is material to the preparation of the defense and is intended for use at trial by the prosecuting attorney. However, the Supreme Court of Ohio has now unilaterally imposed a new and substantially increased evidentiary burden on a defendant's entitlement to pretrial discovery. In many cases, this burden will operate as a barrier to constitutionally mandated pre-trial discovery.

Under Ohio's new rule, in order for Petitioner to access the police department's hard drive so that he may determine whether the computer printout says what the police say it says, Petitioner must first make a prima facie case showing that the print out was "false, incomplete adulterated or spoliated." However, the only means to meaningfully dispute the accuracy of the printout would be to inspect the computer hard drive.

Thus, far from an "easily attainable burden on a defendant," the new rule requires Petitioner to make an impossible showing. See Opp. at 5. Under these circumstances, the Petitioner is left without recourse to inspect the most crucial piece of evidence against him and the prosecutor is improperly cast "in the role of an architect of a proceeding that does not comport with the standards of justice." *Brady v. Maryland*, 373 U.S. 83, 88 (1963). A judicially created rule which so heavily burdens an defendant's liberty interest in defending his case clearly threatens the principles of

fundamental fairness and balance underlying this country's criminal justice system.

This would not be the first occasion on which this Court has determined that the Due Process Clause is implicated by a state's denial of a request for pre-trial discovery. In *Pennsylvania v. Ritchie*, a defendant facing charges of child abuse requested a copy of the Department of Youth Services' file regarding the alleged minor victim to determine whether it contained impeachment evidence or other material relevant to his defense. 480 U.S. 39 (1987). Because neither the defense, prosecution or trial court had actually looked at the file, this Court found that the fundamental fairness requirements of the Due Process Clause required the trial court to conduct an in camera inspection of the file to determine whether it contained material evidence. Id. at 58. Under *Ritchie*, where, as here, the prosecution has made no representation that it actually checked the computer hard drive to determine its content, due process requires the trial court to inspect the hard drive to determine whether it contained evidence favorable to Petitioner.

The State's failure to verify the contents of the computer hard drive also defeats its contention that *Brady v. Maryland*, 373 U.S.83 (1963) resolves the issue in this case. Under *Brady*, the prosecution has a duty to disclose all evidence it deems favorable to the defense. Id. However, "this in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Here, where there is no evidence in the record to show that the prosecutor made any effort to inspect the hard

drive to determine the police officer's veracity, the State cannot be deemed to have met its burden to inspect the evidence under *Kyles*. To rule otherwise may encourage lax investigation by prosecutors eager for a conviction.

In short, the Supreme Court of Ohio now accords a judicially sanctioned deference to the credibility of physical evidence and testimony offered by prosecution and law enforcement officials. Because such deference is wholly inconsistent with principles concerning balance of power in criminal proceedings found in the Due Process Clause and this Court's jurisprudence, the Ohio Supreme Court's decision should be overturned on the basis that it violates the United States Constitution.

II. THE STATE'S INTEREST IN PROTECTING ITS RECORDS NEED NOT BE UNREASONABLY COMPROMISED.

The State claims that Petitioner should be denied the opportunity to inspect the police department's computer hard drive because permitting him to do so would compromise the security of the State's investigative files. Opp. at 3. However, because the information the State endeavors to protect can be easily shielded, the State's interest in total electronic privacy is clearly outweighed by Petitioner's Due Process right to inspect the physical evidence that will be used against him at trial.

Federal and state rules of criminal procedure, including those in Ohio, reflect a conscious and deliberate effort by the legislatures to strike a fair balance between the defendant's need to know and the

state's need to withhold evidence the disclosure of which might jeopardize well founded security or privacy interests. These rules contain restrictions and limitations on a defendant's entitlement to pretrial discovery. See e.g., Ohio Rules of Civil Procedure Rule 16e(1) and (2). The use of protective orders and the establishment of conditions on the time, place and manner of the defendant's inspection of evidentiary materials in the prosecutor's possession are more than commonplace; they are routinely invoked to maintain a reasonable balance between the needs of the prosecution and those of the defendant.

Among the procedural devices adopted by courts to maintain the balance of interests is the opportunity for both sides to have evidentiary materials subjected to an in camera review by the trial judge. See, e.g., *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), supra. In this case—as an intermediate Ohio appeals court held—the trial judge could and should have independently examined the content of the police department's hard drive to determine whether it contained favorable evidence. Such an order would fairly vindicate Petitioner's due process right without comprising the State's interest in electronic privacy.

CONCLUSION

While the State's interest in protecting its confidential investigatory files is considerable, Petitioner's constitutional right to mount a complete defense when charged with a felony is entitled to greater weight. Where, as here, Petitioner's right to inspect physical evidence material to his determination of guilt or innocence is completely foreclosed by a judicially created gloss over the

relevant criminal rule of procedure, the principles of fundamental fairness dictate that a violation of due process has occurred. For these reasons, Petitioner respectfully requests the Court grant his petition for writ of certiorari.

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